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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

To: The Commission

PETITION FOR RECONSIDERATION

KM Broadcasting, Inc. ("KM" or "Petitioners"), pursuant to Section 1.106 of the Commission's Rules, hereby submits its Petition for Reconsideration of the actions taken in the *Sixth Report and Order* ("*Sixth Order*") issued by the Commission in the above-referenced proceeding.[1] Petitioner specifically seeks reconsideration of that part of the Sixth Order which establishes the right of new entrants to file for vacant DTV allotments prior to the conclusion of the NTSC to DTV conversion process. It was one thing for the Commission to protect the existing full power service to the detriment of LPTV licensees by allocating a second channel for conversion purposes. It is quite another to permit new (future) entrants into the DTV licensing process whose initial participation at this late stage in the DTV proceeding will be

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[1] The release date of the Sixth Order was April 21, 1997. However, the date of public notice for the purpose of filing this Petition for Reconsideration is the date of publication in the Federal Register, which was May 16, 1997 (62 FR 26684). See 47 C.F.R. Section 1.4(b)(1). Consequently, this Petition for Reconsideration is timely filed.

harmful to existing LPTV operations. Such a proposal also squarely conflicts with the Commission's own proposal to institute a rule making concerning the future status of LPTV stations as primary. Consequently, the FCC's action in this regard must be reversed. Furthermore, the Commission's decision must be clarified in several respects. In support whereof, the following is submitted.[2]

I. Background

In the *Sixth Order*, the Commission in ¶ 95 renders the following decision:

> We concur with the commenting parties that it is important to continue to foster our longstanding broadcast policy goals of diversity and encouraging new entry, particularly by minorities and women. We also believe that fostering these goals is consistent with our spectrum management responsibilities to ensure that the DTV spectrum is used efficiently. Accordingly, we will permit unused DTV spectrum to be used by both new and displaced LPTV and TV translator stations. We will also allow new entrants and non-eligible broadcasters to seek and apply for new DTV allotments. (footnote omitted) In addition, as suggested by WB, we will allow non-eligible broadcasters to convert their existing NTSC operations to DTV service at any time during the transition, provided those operations are within the core spectrum area. We believe that this action will further our diversity goals and promote the development and expansion of new networks. We further encourage incumbent broadcasters to seek partnerships with new entrants in developing new stations in areas where additional unused spectrum may be available. (footnote omitted)
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> In addition, in footnote 161, the Commission stated that;

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[2] Petitions For Reconsideration were required to be filed by May 21, 1997. See *Report and Order, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, FCC 95-230, released June 30, 1995. Consequently, the AFL Petition For Reconsideration is timely filed.

> We intend to give particular consideration to those parties who had applications for a construction permit on file as of October 24, 1991, who are ultimately awarded a full-service broadcast station license, given the reliance that these parties may have placed on the scheme we established before passage of the Telecomm Act. See Fourth Further Notice, at 10544-45.

II. Standard of Substantive "Arbitrary and Capricious" Review

Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, expressly vests a reviewing court with the right to hold unlawful and set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA particularly proscribes the failure to draw reasoned distinctions where reasoned distinctions are required.[3] An agency is required to take a "hard look" at all relevant issues and considered reasonable alternatives to its decided course of action.[4] A decision resting solely on a ground that does not justify the result reached is arbitrary and capricious.[5] An agency changing its course must supply reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.[6] When an agency

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[3] *American Trucking Associations, Inc. v. I.C.C.*, 697 F. 2d 1146, 1150 (D.C. Cir. 1983).

[4] *Neighborhood Television Co. v. F.C.C.*, 742 F. 2d 629, 639 (1984); *Telocator Network v. F.C.C.*, 691 F. 2d 525, 545 (D.C. Cir. 1982) (agency must consider all relevant factors); *Action For Children's Television v. F.C.C.*, 564 F. 2d 458, 478-79 (D.C. Cir. 1977) (agency must give relative factors a "hard look").

[5] *MCI Telecommunications Corp. v. FCC*, 10 F. 3rd 842, 846 (D.C. Cir. 1993).

[6] *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms. *Telecommunications Research and Action Committee v. FCC*, 800 F. 2d 1181, 1184 (D.C. Cir. 1986). See also *Achernar Broadcasting Co. v. FCC*, 62 F. 3d 1441 (D.C. Cir. 1995) (the Commission must fully articulate a new policy if it has truly adopted one).

III. The Commission's Action is Improper

A. The Commission's Action Does not Constitute Reasoned Decision Making

The Commission's decision to open the eligibility for unused DTV spectrum to any and all parties is arbitrary and capricious. The Commission's sole basis for allowing anyone to apply for unused DTV spectrum is that "... it is important to continue to foster our longstanding broadcast policy goals of diversity and encouraging new entry, particularly by minorities and women." This one-sentence rationalization can hardly be the basis for a decision which will have serious ramifications throughout the entire broadcast industry and could potentially harm a substantial number of LPTV stations.

It is one thing to create a class of eligible broadcasters which excludes LPTV broadcasters, allocate a second channel to existing full-power stations, not to LPTV stations, and to displace LPTV stations in order to achieve the goal of the conversion of the existing analog television system. It is quite another to continue this regulatory prejudice against LPTV operators who have built and are operating television broadcast

stations, to the benefit of new entrants into broadcasting years after the DTV proceeding was initiated.

KM recommends that, at the very least, the Commission should, upon reconsideration, restrict such eligibility initially to LPTV licensees. If LPTV licensees are not willing to apply for such digital spectrum, then any and all parties should be eligible at that point.

In the alternative, should the Commission not reconsider and change its rules as set out above, then the Commission should employ the traditional cutoff rules for such applications. If such rules are used, then existing LPTV stations would than have some warning that their channels are being sought for digital licenses, and would have the opportunity to file a mutually exclusive application prior to the close of the "B" cut-off period.

The utilization of a window processing regime would be unreasonable, since such notice would not be given to an existing LPTV licensee. There is no need to establish a system whereby existing licensees would be ambushed by new entrants, nor require existing licensees to expend the substantial resources to prepare and file digital applications defensively, for the sole purpose of protecting their licenses. The Commission's establishing this type of application filing regime would clearly squander the Commission's scarce resources and would be entirely unreasonable for these reasons.

The Commission's statement in footnote 161 that it will give particular consideration to those parties who had applications for

a construction permit on file as of October 24, 1991, who are ultimately awarded a full-service broadcast station license, is also completely arbitrary. The Commission engages in a never-ending series of rules changes which time and again affects currently pending applications. The Supreme Court has determined that such a situation does not constitute retroactive rule making.[7] There is no basis for favoring such applicants in this case, when the Commission routinely engages in such conduct for which it never compensates affected applicants.

Furthermore, the proposal is inconsistent with the proposal in ¶143 to consider in a future rule making whether to create a new class of low power television broadcast stations that would modify the secondary status of LPTV stations and provide them some level of interference protection, i.e., elevate LPTV stations to primary status. It is arbitrary and capricious to create rules that will harm existing stations now, while the Commission has already indicated it will protect such stations in the future.

B. The Commission's Decision Must Be Clarified

The Commission's decision must be clarified in many respects. Certainly, it must be clarified that a future applicant for unused DTV spectrum, particularly a new entrant into the broadcasting industry at this late stage in the DTV proceeding, cannot displace an existing LPTV licensee.

Furthermore, the Commission states that "we will allow non-

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[7] *See Bowen v. Georgetown University Hospital*, 488 U.S. 208 (1988).

eligible broadcasters to convert their existing NTSC operations to DTV service at any time during the transition, provided those operations are within the core spectrum area." Certainly, the Commission must make clear whether it will extend some protection to non-eligible broadcasters who actually convert their existing NTSC operations to DTV service. It would be completely arbitrary to allow such conversion and then maintain secondary status for such a digitally-converted LPTV station.[8]

WHEREFORE, the foregoing premises considered, KM Broadcasting, Inc., respectfully requests that the Commission reconsider its action in the *Sixth Report and Order*, supra, with respect to allowing new entrants to apply for unused DTV spectrum at this time.

Respectfully Submitted,

KM BROADCASTING, INC.

By: Robert E. Kelly
Robert E. Kelly
President

Dated: June 16, 1997

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[8] KM is assuming that LPTV stations are included in the definition of non-eligible broadcasters, as established earlier in this proceeding. Both full-power and LPTV stations are regulated as broadcast stations under Title III of the Communications Act. See *Low Power Television Service*, 51 Rad. Reg. 2d 476 (1982), *recon. granted in part on other grounds*, 53 Rad. Reg. 2d 1267, *recon. denied*, 95 FCC 2d 657 (1983), *aff'd sub nom. Neighborhood TV Company, Inc. v. FCC*, 742 F. 2d 629 (D.C. Cir. 1984). Therefore, there can be no gainsaying that LPTV licensees are broadcasters.